

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHERRILL CHANCELLOR**

Claimant

VS.

**CESSNA AIRCRAFT COMPANY**

Respondent,

Self-Insured

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Docket No. 267,576

**ORDER**

Respondent appealed the July 11, 2002 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on January 17, 2003, in Wichita, Kansas.

**APPEARANCES**

E. L. Lee Kinch of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, it should be noted that the record also includes the stipulation regarding the value of additional compensation items that was filed on June 14, 2002.

**ISSUES**

This is a claim for repetitive trauma injuries to claimant's upper extremities, shoulders and neck. The parties stipulated the appropriate date of accident for these injuries was May 24, 2001. The parties also agreed claimant's accidental injuries arose out of and in the course of her employment with respondent.

In the July 11, 2002 Award, the Judge determined claimant had sustained a 25 percent whole body functional impairment. The Judge also found a 73 percent work disability (a permanent partial general disability greater than the functional impairment rating), which was based upon a 46 percent task loss and a 100 percent wage loss.

Respondent appealed the Award requesting the Board to review the nature and extent of claimant's disability. At oral argument before the Board, respondent argued that claimant's permanent partial general disability should be based upon the task loss opinions of either Dr. Paul W. Toma or Dr. Kevin Komes. Accordingly, respondent requests the Board to reduce the work disability determined by the Judge.

Conversely, at oral argument before the Board, claimant requested the Board to affirm the finding that claimant has sustained a 73 percent work disability.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds, as follows:

Claimant injured her upper extremities, shoulders and neck while building electrical bundles and wire harnesses for respondent's aircraft. As indicated above, the parties agreed the appropriate date of accident for claimant's repetitive trauma injuries is May 24, 2001, which is the last day claimant worked for respondent.

Claimant began seeking medical treatment in November 1999. As a result of the work-related injuries, claimant eventually underwent five surgeries. In May 2000, claimant had an ulnar nerve transfer in the left elbow. Two months later, in July 2000, claimant had an ulnar nerve transfer in the right elbow and a carpal tunnel release on the right wrist. The third surgery occurred in September 2000, when claimant underwent a trigger release on her right thumb. Several months later, in February 2001, claimant had right shoulder surgery followed by left shoulder surgery in mid-May 2001. When claimant was terminated in May 2001, she was still working under medical restrictions limiting her to using her right upper extremity only.

On June 25, 2001, claimant's doctor removed her medical restrictions at her insistence. Claimant's testimony is uncontradicted that she had been advised she was ineligible for unemployment benefits due to her medical restrictions. Accordingly, the doctor complied with claimant's request and removed her restrictions. Although making approximately two or three contacts per week with potential employers, when claimant last testified in May 2002 she remained unemployed. According to exhibits with the regular hearing transcript and claimant's deposition transcript, claimant made 89 contacts with potential employers between May 29, 2001, and May 21, 2002.

The record contains the expert medical opinions from three doctors. Dr. Jane K. Drazek, who saw claimant at her attorney's request, examined claimant in August 2001. Dr. Drazek is the medical director of Via Christi Rehabilitation Center in Wichita, Kansas, and is board-certified in physical medicine and rehabilitation. The doctor's diagnosis included the following:

1. Chronic cervical, shoulder and upper extremity pain and paraesthesia [sic].
2. Imaging evidence of cervical spondylosis with a moderate posterior central disc protrusion at C5-6 and degenerative changes at C5-6 and C6-7.
3. Status-post anterior transfer of the left ulnar nerve, 05/22/00.
4. Status-post anterior transfer of the right ulnar nerve and release of the right carpal tunnel, 07/07/00.
5. Status-post release of right thumb trigger finger, 09/22/00.
6. Arthroscopy with acromioplasty of right shoulder, 02/19/01.
7. Status-post arthroscopy with labral repair and decompression of the left shoulder, 05/01.
8. Persistent shoulder range of motion deficits and grip strength weakness.
9. Bilateral lateral epicondylitis.
10. History of remote traumatic amputation of the distal phalanx of the right fifth digit.<sup>1</sup>

According to Dr. Drazek's interpretation of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA *Guides*), claimant has sustained a 26 percent whole person functional impairment due to the injuries that she sustained while working for respondent. The doctor also believes that claimant should avoid overhead use of her upper extremities; avoid repetitive pushing, pulling, and gripping; avoid repetitive wrist flexion and extension; avoid maintaining the head and neck in one position for a prolonged period; limit cervical extension; and limit repetitive lifting to no greater than 10 to 15 pounds and limit occasional lifting to no greater than 25 to 30 pounds.

Finally, Dr. Drazek reviewed a list prepared by vocational rehabilitation counselor James T. Molski of former work tasks that claimant performed in the 15-year period before she sustained these repetitive trauma injuries. The doctor identified 17 of the 37 former work tasks, or 46 percent, that claimant should no longer attempt to perform, considering the doctor's medical restrictions.

Dr. Paul W. Toma, who is the surgeon who operated on claimant's shoulders, treated claimant from January through August 2001. In February 2001, the doctor operated on claimant's right shoulder, finding that claimant had injured the biceps tendon

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<sup>1</sup> Drazek Depo., Ex. 1 at 7.

and finding bursal tissue that most likely was causing her shoulder impingement. The doctor decompressed the right shoulder.

In May 2001, Dr. Toma operated on claimant's left shoulder, finding a torn ligament. The doctor decompressed that shoulder also. Following the left shoulder surgery, Dr. Toma initially released claimant to one-handed work. As indicated above, in June 2001 the doctor released claimant to full activities at her request.

In September 2001, Dr. Toma rated claimant as having a 12 percent whole person functional impairment under the *AMA Guides*. A month later, the doctor determined that claimant only had a 10 percent whole person functional impairment. At his deposition the doctor could not explain the discrepancy other than concluding the first rating must have resulted from a math error.

Dr. Toma was asked to review Mr. Molski's task list. Although he identified at least three tasks that he was concerned about due to the amount of weights lifted, the doctor was uncertain as to claimant's permanent work restrictions and reluctant to provide a task loss opinion without first obtaining a functional capacity evaluation. The doctor testified, in part:

Q. (Mr. Kinch) And, as you indicated during your direct examination, had you been asked by representatives of Cessna to perform an examination or had you been asked by Cessna to provide an opinion concerning the issue of permanent restrictions, you would have wanted -- in fairness to Cessna and in fairness to your patient, you would have wanted to see her for an appointment and, in addition, order a functional capacity evaluation to help you authoritatively and reliably assess the question of whether restrictions were appropriate, is that a fair statement?

A. (Dr. Toma) That's generally my practice, yes, that's correct.<sup>2</sup>

....

Q. So for you to provide an opinion to this Court, an authoritative opinion to this Court as it relates to the issue of permanent restrictions, you would want to see her again and you would want to order a functional capacity evaluation, wouldn't you, sir?

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<sup>2</sup> Toma Depo. at 22.

A. If I were asked to provide permanent restrictions or functional levels, yes, I would want to see a functional capacity assessment test.<sup>3</sup>

The last doctor to testify was Dr. Kevin Komes, who is a board-certified physical medicine and rehabilitation physician who saw claimant on four occasions at the request of Kemper Insurance, respondent's workers compensation administrator. In January 2000, the doctor saw claimant and recommended that she be evaluated for potential non-work-related causes of her complaints, including thyroid and rheumatological evaluations. The doctor saw claimant again in late January and then again in February 2000. The doctor obtained electrodiagnostic studies that revealed claimant had mild bilateral carpal tunnel syndrome.

Dr. Komes last saw claimant in March 2002 to evaluate her medical condition for purposes of this claim. According to Dr. Komes' evaluation, claimant has sustained a 25 percent whole body functional impairment under the *AMA Guides* (4th ed.). The doctor determined claimant had sustained permanent impairment to both shoulders due to the bilateral surgeries for shoulder impingement, permanent impairment to both upper extremities for ulnar nerve entrapment and surgeries on the elbows, and permanent impairment to the right upper extremity due to injury to the median nerve. The doctor did not rate claimant's neck as he did not believe the disc bulge in her neck was related to work and, in addition, there were no significant neuromuscular findings in the cervical area.

Despite that relatively high functional impairment rating, Dr. Komes did not believe claimant needed any permanent medical restrictions. Consequently, Dr. Komes believes claimant is able to perform all 37 of her former work tasks.

The Board finds that claimant has sustained a 26 percent whole person functional impairment as a result of the May 24, 2001 accident. Moreover, the Board affirms the Judge's finding that claimant has sustained a 46 percent task loss. As indicated above, Dr. Toma was quite reluctant to analyze claimant's task loss without obtaining additional information in the form of a functional capacity evaluation and Dr. Komes' task loss opinion was questionable as it eliminated no work tasks, including those tasks that had caused claimant's injuries in the first instance. When considering the entire record, the Board finds Dr. Drazek's opinions the most persuasive.

#### **CONCLUSIONS OF LAW**

Although the Board's findings are somewhat different, the July 11, 2002 Award for a 73 percent permanent partial general disability should be affirmed.

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<sup>3</sup> *Id.* at 23.

Because claimant's injuries comprise an "unscheduled" injury, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*<sup>4</sup> and *Copeland*.<sup>5</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

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<sup>4</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>5</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>6</sup>

Respondent does not contest that claimant has made a good faith effort to find appropriate employment. Moreover, the Board concludes that claimant has made a good faith effort to find appropriate work. Therefore, claimant's wage loss for purposes of determining the permanent partial general disability is 100 percent.

Averaging claimant's 46 percent task loss with the 100 percent wage loss yields 73 percent. Accordingly, the Board affirms the Judge's conclusion that claimant has sustained a 73 percent work disability.

**AWARD**

**WHEREFORE**, the Board affirms the July 11, 2002 Award for a 73 percent permanent partial general disability as entered by Judge Frobish.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant  
Edward D. Heath, Jr., Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>6</sup> *Id.* at 320.